

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:

UNITED STATES OF AMERICA

CR-13-607

-against- :

United States Courthouse
Central Islip, New York

PHILLIP A. KENNER and
TOMMY C. CONSTANTINE,

Defendants. :

March 13, 2015
2:30 p.m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

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Proceedings recorded by mechanical stenography.
Transcript produced by computer.

1 THE CLERK: Calling criminal case number
2 13-CR-607, United States of America vs. Phillip Kenner and
3 Tommy Constantine.

4 Counsel, please state your appearance for the
5 record.

6 MR. MISKIEWICZ: Good afternoon, your Honor.
7 James Miskiewicz, for the United States.

8 THE COURT: Good afternoon.

9 MR. HALEY: Good afternoon, Judge.

10 Richard Haley, for the defendant Phillip Kenner
11 seated to my right.

12 THE COURT: Good afternoon.

13 MR. LARUSSO: Robert LaRusso, for
14 Mr. Constantine.

15 Good afternoon, your Honor.

16 With your permission, we have Mr. Constantine on
17 telephone call right now.

18 I would like to express my thanks. I know it
19 was a late request and I appreciate the opportunity to
20 have Mr. Constantine call in rather than a personal
21 appearance and I thank the Court for that.

22 THE COURT: Mr. Constantine, are you able to
23 hear everybody okay?

24 MR. CONSTANTINE: Yes, your Honor.

25 THE COURT: If, at any point, you're having

1 trouble, let me know.

2 THE DEFENDANT: I will. Thank you.

3 THE COURT: So, as you know, we're here for
4 argument on the defendants' motions, various pretrial
5 motions.

6 I did receive Mr. LaRusso's reply in connection
7 with his motion.

8 And as I discussed, Mr. Haley, I will give you a
9 chance to orally reply with respect to his motion.

10 You don't have to go through every aspect of
11 your motion. It's a chance for you to highlight anything
12 you wish to highlight, and then I'll give the government a
13 chance to respond.

14 Mr. LaRusso, do you want to go first.

15 MR. LARUSSO: Thank you, your Honor.

16 Your Honor, if I could just address the first
17 part of our motion and that is the motion to dismiss the
18 indictment for misconduct, governmental misconduct.

19 I would like to preface my remarks by saying
20 when I first began reviewing this case and discussing the
21 possibility of this motion, I was kind of a little
22 reluctant to put pen to paper.

23 But since the time I had that hesitation, I have
24 had an opportunity to talk to my client at length and
25 obviously more important, your Honor, I had an opportunity

1 to look at the indictment and the evidence that the
2 government has presented.

3 To be candid with the Court, I'm not as well
4 versed in the facts as my client because I have not had as
5 much time to review them, but there's enough information
6 that's been presented to me, reliable information, that
7 supported our request for the motion to dismiss.

8 What I think in a practical sense, Judge, I
9 don't think that motion can be addressed simply on papers.

10 I think, looking at the allegations of
11 impropriety, it raises the issue of a possible hearing,
12 and I think that's the first aspect I would like the Court
13 to examine at this point, whether or not enough
14 information is presented to the Court to warrant a hearing
15 to determine whether or not there was selective
16 presentation of evidence, selective withholding of
17 evidence in the first grand jury, that resulted in the
18 indictment.

19 I know having been before you, Judge, you read
20 all of the materials and you digest it very well and as I
21 talk and raise issues, you will pinpoint the critical
22 areas that are of concern to you and I'll be glad to
23 answer them if they become apparent.

24 In terms of an overall presentation, your Honor,
25 this is a very unusual case. It began in the Southern

1 District of New York for a number of years. And for
2 whatever reason we know they decided not to pursue the
3 matter; and, instead, they referred the matter over to the
4 Eastern District of New York.

5 And I can hazard a reasonable guess that it was
6 the case agent in this case, Mr. Galioto, who was
7 responsible for that presentation.

8 What was also very significant, Judge, is some
9 of the color behind this case.

10 The unknown shadow that is going to play a role
11 at this trial is a number of individuals, one of whom you
12 know from the paperwork, is a man by the name of Kenneth
13 Jowdy, who seems to have skirted his responsibilities in
14 this case, represented by a very well known lawyer in New
15 York City who was very instrumental in developing contact
16 with the Daily News and presented publicity detrimental to
17 my client prior to this indictment.

18 More importantly, Mr. Jowdy is represented by
19 Mr. Louie Freeh, who is a former director of the FBI. I'm
20 not saying, Judge, and I will not ask the Court to draw
21 the conclusion that there's an impropriety in Mr. Freeh
22 representing Mr. Jowdy or Mr. Galioto, an FBI agent
23 pursuing the case, or any other reason, other than what he
24 felt was a legitimate criminal investigation, but it just
25 raises an important color in terms of how we look at the

1 facts.

2 THE COURT: Let me just try to focus you a
3 little bit.

4 I have read the papers and some of the history
5 of the case we already discussed in connection with bail
6 applications and other issues, so I understand it started
7 in the Southern District.

8 For purpose of what you're arguing on the
9 dismissal, there are two things you appear to be arguing,
10 that there's a basis for a dismissal or review by the
11 Court of the grand jury transcript.

12 The first relates to an allegation that the
13 agent told a witness in a civil litigation deposition --
14 instructed the witness not to answer certain questions.

15 That's one, right?

16 MR. LARUSSO: That's one.

17 THE COURT: On that one --

18 MR. LARUSSO: On that as well, Judge, it's kind
19 of a corollary to that.

20 There was also a civil litigation involving an
21 investment hockey player by the name of Tyson Nash. He
22 was approached by Mr. Galioto to refrain from bringing a
23 suit against two of the government witnesses, Mr. Berard
24 and Mr. Kaiser, and he obviously did not listen to that
25 kind of request by Mr. Galioto, so there's a joint portion

1 of Mr. Galimoto's conduct that we claim tried to interfere
2 with the judicial process.

3 And the important point here, Judge, is in
4 counter to the government's argument that it's irrelevant
5 to this case, is the questions in the deposition were
6 related to the global settlement.

7 THE COURT: I know it couldn't have effected the
8 grand jury presentation, because it happened afterwards.
9 It could not have had any impact on the grand jury because
10 it happened afterwards.

11 In fact, in your reply, the lawyer, whatever
12 effort was or was not made with regard to preventing the
13 question from being answered, it looks like that through a
14 motion to compel the question was answered subsequently in
15 a telephonic deposition, a supplemental deposition.

16 I don't understand how that issue could be the
17 basis for a dismissal of an indictment that had already
18 been issued. It's pre-attenuated, even assuming that it
19 occurred, it's so attenuated.

20 The standard for dismissal of an indictment, as
21 you know, is extremely high. How could an indictment be
22 dismissed for something that happened afterwards in a
23 civil litigation?

24 MR. LARUSSO: You know, Judge, that obviously
25 was of concern to me.

1 And what I realized by looking at these
2 post-indictment actions of Mr. Galioto, which I think are
3 clearly inappropriate, is that it colors the presentation
4 of the evidence to the grand jury. It gives you an idea
5 or a mindset of the person who would selectively present
6 testimony before a grand jury.

7 This indictment was returned I think it was
8 about a year-and-a-half ago. I wasn't around during the
9 early stages, Judge, but it wasn't that far back.

10 And these actions are consistent with an agent
11 who would selectively present testimony in the grand jury,
12 who would withhold information that may give the grand
13 jury a different view of the evidence.

14 Judge, we're looking at the grand jury in the
15 situation of trying to get a fair presentation. And if
16 our allegations have a semblance of support that there
17 were facts that altered the government's theory of the
18 facts, not the theory of the case, then Mr. Galioto's
19 present conduct in trying to protect these witnesses and
20 trying to tell them to sue other people other than
21 government witnesses in terms of not talking about the
22 global settlement fund, all of which gives you an idea,
23 wait a minute, maybe there was some merit to these
24 allegations that are being made.

25 That's the point, Judge. That's why I say it

1 relates back to the intent, it relates back to the person
2 who we are alleging was involved in the impropriety.

3 THE COURT: And the second piece deals with
4 Mr. Privitello.

5 I read the back and forth on that, I read your
6 client's affidavit. But putting aside the Sergei Gonchar
7 piece, that's a separate piece, and I'll ask the
8 Government about this, but it appears they may not be
9 pursuing that piece any longer.

10 But the core of what your client appears to be
11 claiming is that there's an explanation for where the
12 funds went and why they went there.

13 But, again, their failure to put in what his
14 explanation is of that, it is my understanding of the law,
15 is not a basis for a dismissal of the indictment.

16 In fact, I was reading his affidavit very
17 carefully and there appears to be an acknowledgement that
18 a portion of Mr. Privitello's funds, regardless of what
19 Mr. Gonchar told him he could or could not do with the
20 funds he was investing, that a portion of Mr. Privitello's
21 funds were used to pay for Mr. Constantine's personal
22 expenses, including the legal fees out of the other
23 lawsuit related to a race car team. I'm not even sure
24 what it relates to.

25 In his affidavit, his response to that was most

1 of it was Mr. Gonchar's money, which I interpreted to be
2 an acknowledgment that a portion of it was
3 Mr. Privitello's money and apparently some of his money
4 also went to Mr. Gonchar -- Mr. Privitello's money went to
5 Mr. Gonchar.

6 So, again, I'm not sure I understand, and I saw
7 he has an explanation for why there's a theory that paying
8 the legal fees of a civil case was appropriate in some
9 way. I saw something along those lines.

10 Again, as you know, it's a criminal case. The
11 defendants may have explanations for what they're doing,
12 but the Government's failure to stand up in the grand
13 jury, even assuming they knew that was his explanation,
14 and tell the grand jury, well, Mr. Constantine, if he were
15 sitting here, would say this is why he did this, that's
16 not a basis for a dismissal of an indictment.

17 MR. LARUSSO: Judge --

18 THE COURT: Am I reading the facts wrong?

19 My understanding of the facts is some of it is
20 his money. We can go back and forth about how much, but a
21 portion of Mr. Privitello's money was used apparently by
22 Mr. Constantine to pay for legal fees and to pay
23 Mr. Gonchar for something, or am I wrong about that? I
24 thought that's what his affidavit acknowledged.

25 MR. LARUSSO: I spoke to my client. When you

1 have a factual dispute, that's for a trial, not for the
2 Court to make a determination.

3 My client showed me documentation and gave me
4 the history of these allegations.

5 Mr. Galieto was well aware of what happened with
6 that \$155,000; yet, the indictment alleges that it went to
7 AC Falcon based upon that allegation that \$155,000 that
8 was allegedly diverted was used to forfeit an airplane.

9 Well, Mr. Galieto was well aware, Judge, that
10 that money did not go to AC Falcon. It went to a
11 different company called AC Avalon.

12 As soon as that money went to that company,
13 there was a correction made and it went to the proper
14 company, Eufora, and payment for bills.

15 So, right away, the first thing that comes to
16 mind is wait a minute. You have 155,000. The agent knew
17 or should have known, if he had looked at the proper
18 documentation, the bank records, he would have been able
19 to see that the money was diverted the next day
20 immediately back to the account where it should have been.

21 What the government does is they then take the
22 superseding indictment and they mask this. They take out
23 the specific allegations in the indictment which we
24 demonstrated in our motion to dismiss was wrong, and they
25 now go from a specific allegation, which we refuted, to

1 now a general allegation, which I don't even know yet what
2 the personal expenses they claim were paid for by some of
3 the money that they claim was diverted.

4 So this is just one aspect of what we're looking
5 at. We're not looking at just each one individually and
6 saying to the Court that there is no factual dispute.

7 There may be some factual disputes. There's more to this.

8 The other thing that was very, very interesting,
9 Judge, is when we filed our motion and raised the issue of
10 evidence withholding to protect witnesses such as
11 Mr. Kaiser, evidence withholding to protect witnesses such
12 as Mr. Jowdy, and, Judge, you can almost tell from the
13 tone of my voice, the progression of my own unbelief of
14 what was taking place when you finally look at some of the
15 facts.

16 So the superseding indictment comes down. We
17 removed the specific allegations. We now have general
18 allegations that we're not sure exactly where the specific
19 funds were diverted to. We will have to guess at that.
20 And maybe we should be asking the government for a bill of
21 particulars to give us a little more information on what
22 we're going to be defending.

23 There was another aspect, Judge, in addition to
24 the Privitello matter, in addition to the Kaiser
25 situation, in addition to the Ken Jowdy situation which

1 I'll discuss in a minute. This came to me recently, very
2 recently.

3 Mr. Constantine and Mr. Kenner are accused of
4 diverting approximately \$4.1 million from the global
5 settlement fund. The Court knows what that is, why it was
6 brought into effect.

7 I had a chance to speak to Mr. Gonchar recently
8 and I learned from Mr. Gonchar that he hired a forensic
9 accountant by the name of Mr. Stempel, and Mr. Stempel
10 went through the expenditures from that account.

11 Mr. Gonchar is satisfied that the money was
12 spent -- and he's one of the hockey players and probably
13 one of the individuals who invested most -- that the money
14 was spent, as he understood it, and I know the government
15 is going to say there are other hockey players and they
16 have a different view of it, but the point I'm making,
17 Judge, is that even here there is a substantial question
18 regarding whether or not the grand jury had an opportunity
19 to review this critical evidence of a hockey player who in
20 indictment number one is a victim, and is no longer in the
21 indictment that's been returned by the Government.

22 Why? This forensic accountant, did he testify
23 in the grand jury? Did he give his report as to why the
24 \$4.1 million in his mind was properly spent?

25 Clearly, he didn't because the grand jury

1 returned an indictment charging Mr. Kenner and
2 Mr. Constantine. Another example.

3 The other one, Judge, is as much as a serving
4 instrument as the one I related. In the old indictment, I
5 think it's paragraphs 31 and 32, the government talks
6 specifically about \$700,000 being invested by hockey
7 players, and that the money was then diverted to
8 Mr. Kenner and to Mr. Constantine.

9 Well, I looked at the records. Mr. Constantine
10 didn't get a penny of that. The money went a portion to
11 Mr. Kaiser and as the indictment says, the first
12 indictment, he returned it to Mr. Kenner.

13 What the evidence doesn't show is that if you
14 got all the bank records, which we did not, especially
15 Mr. Kaiser who is a witness for the government, he got
16 more money than the \$70,300 that the government claimed he
17 got in return, he got approximately \$105,000 more.

18 So the point I'm making, Judge, when we start to
19 look at these isolated incidents, they mount up and the
20 superseding indictment is just further proof that
21 something was wrong in that grand jury, something
22 drastically wrong, because all my client wanted was a fair
23 presentation of the evidence before the grand jury.

24 It didn't happen and I'm not asking for a
25 dismissal because that's inappropriate now. I'll be

1 asking for that if the Court gives us at least an
2 opportunity to have a hearing.

3 The last one that was very interesting to me,
4 and I'm just learning this, Judge, everybody says that
5 Mr. Jowdy is a victim. Well, from what I'm learning,
6 Mr. Jowdy is more than a victim, he was a participant.

7 In the first indictment, paragraph 31, they talk
8 about \$250,000 being invested by a John Doe number eight
9 in Eufora -- I'm sorry, in a Mexican land venture.

10 Instead, the allegation is that the money was
11 diverted to Eufora.

12 Well, there's no mention of Jowdy in that
13 \$250,000, but the records are going to show that Mr. Jowdy
14 actually got \$8 million for the land development from the
15 hockey players. 250 that's alleged in the indictment went
16 to his company. I don't know if it was the Baha
17 Corporation or the Diamante Corporation.

18 But you know what Mr. Jowdy does? He takes the
19 \$250,000, he then sends it to Eufora as his investment
20 under LMJ Management.

21 Where is this in the indictment?

22 The government withholds these records from
23 Mr. Jowdy, Baha, the LMJ, which would have shown Mr. Jowdy
24 was more than a victim, he was a participant in the
25 fraudulent scheme.

1 So when I looked at all these incidents, I said
2 to myself, well, wait a minute. We have specific
3 allegations. My client has alleged improprieties in
4 regards to at least three or four in the indictment. He's
5 now coming in and he's faced with an indictment that no
6 longer has the specificity, they removed the questionable
7 factual material, and that's where Mr. Galioto's efforts
8 to interfere with the judicial process and to get somebody
9 to sue Mr. Kenner as opposed to Mr. Kaiser or Mr. Berard,
10 two of the government's witnesses, adds color to what
11 really transpired.

12 So I'm asking the Court, in terms of looking at
13 our questions regarding a fair review of the facts, that
14 there should at least be a hearing on the matters that I
15 have addressed here briefly. I marked them as four
16 separate areas.

17 THE COURT: Okay. Do you want to address the
18 severance issue briefly.

19 MR. LARUSSO: Yes, your Honor.

20 THE COURT: My only question on that is they're
21 not going to introduce the Home Depot recording, so I want
22 you to confirm, I don't see any piece of evidence talking
23 about an e-mail to potentially raising some issue.

24 I'm not aware of any piece of evidence,
25 admissible evidence, that creates some confrontation

1 clause issue where Mr. Kenner is saying something about
2 your client in some piece of evidence that he won't be
3 able to challenge. It's not an evidentiary issue at this
4 point.

5 MR. LARUSSO: I think right now it's the
6 government's position that they're not going to use the
7 tape, that my argument that the introduction of that tape
8 would prejudice my client barring a severance has
9 obviously been removed.

10 But there always is and will be the possibility
11 that Mr. Kenner will testify in his own behalf, and that
12 he will then present his version of the facts and the
13 government would be able to introduce the tape and the
14 substance of the tape through him.

15 So I'm very -- I guess I look forward in
16 advancement as to what will happen at trial. I see that
17 as a distinct possibility.

18 Your Honor, the tape is not the only reason
19 we're moving for severance.

20 We're also moving for severance on the grounds
21 that there are substantially antagonistic defenses between
22 Mr. Kenner and Mr. Constantine. They're going to be
23 pointing the finger at each other.

24 THE COURT: The cases are clear that finger
25 pointing is not sufficient for a severance.

1 The standard is for it to be so antagonistic to
2 warrant a separate trial, the jurors would have to, in
3 order to believe one person's defense, would have to
4 conclude that the other person was guilty.

5 And I don't see that as a situation here. Even
6 if both defendants testified and said to the jury, well, I
7 didn't do anything wrong. I gave the money to
8 Mr. Constantine, and Mr. Constantine says I didn't do
9 anything wrong, I gave the money to Mr. Kenner.

10 That doesn't necessarily -- the jury could have
11 found neither of them committed fraud, yet they relied on
12 each other, but neither of them committed any fraud.

13 Your argument to me in the first motion is that
14 there was no fraud at all, so why couldn't the jury
15 conclude that even though to some extent they may be
16 saying I wasn't responsible, he was responsible, the jury
17 could conclude that neither of them did anything wrong.

18 MR. LARUSSO: There are substantial indications,
19 Judge, they're going to be pointing the finger at each
20 other and the jurors will have to decide if this person
21 says this, then the other has to be guilty.

22 For example, as I mentioned in the brief, the
23 government themselves in the search warrant that was
24 executed in Mr. Kenner's house, they referred to an e-mail
25 that Mr. Kenner had sent where he accuses Mr. Constantine

1 of misappropriating money from the global settlement fund.

2 Now I know from the facts of the case, Judge,
3 that Mr. Kenner reviewed all of the expenditures that were
4 attributed to the global settlement fund, and many of the
5 allegations stem from his belief that those expenditures
6 were inappropriate and Mr. Constantine was responsible for
7 the theft.

8 So just looking at the \$4.1 million allegations
9 in the indictment, you've got two fingers pointing in the
10 direct opposite way.

11 I have Mr. Gonchar, and a forensic accountant,
12 and Mr. Constantine saying one thing, and I got Mr. Kenner
13 who will be taking the stand and at least on
14 cross-examination pointing the finger at Mr. Constantine.

15 That was actually the basis for that count, that
16 report that was done and reviewed by Mr. Kenner in regards
17 to the expenditures, but there's more than that.

18 THE COURT: If Mr. Kenner says I didn't
19 misappropriate that money, any money that was taken out of
20 there was taken by Mr. Constantine.

21 And if Mr. Constantine has a legitimate
22 explanation for what happened to the money, it doesn't
23 matter that Mr. Kenner is saying I didn't take that money,
24 he took that money. The question is whether or not
25 there's a legitimate reason.

1 MR. LARUSSO: And that's the important thing.
2 What if the jury believes him and doesn't believe my
3 client? I know they're going to say A and B, but it's
4 what the jury is going to do. If the jury says I don't
5 believe you, I believe him, we're in the area where
6 antagonistic defenses are at least looked at by the Court
7 as a possibility for severance.

8 That's what I'm saying, Judge, is that if you
9 look at the facts, your client is going to say he didn't
10 do it, but if they don't believe him, then that means he's
11 going to be found guilty.

12 THE COURT: I don't follow that.

13 If Mr. Kenner says I didn't take any money, that
14 money went to Mr. Constantine, right?

15 That doesn't necessarily mean Mr. Constantine
16 did anything wrong either. Mr. Constantine can say, yeah,
17 I had that money, but the victim gave me permission to use
18 it in this manner. It doesn't -- he's not necessarily
19 pointing the finger back at Mr. Kenner.

20 MR. LARUSSO: It's even simpler than that,
21 Judge.

22 When Mr. Constantine -- when Mr. Kenner says
23 that Mr. Constantine took the money, he took it for
24 purposes other than what it should have been for, period,
25 end of story. That's why he claims in this indictment that

1 Mr. Constantine defrauded the investors by taking this
2 money.

3 It's very simple in terms of when you look at
4 the expenses, Mr. Kenner is going to say that they were
5 not related to the global settlement fund and
6 Mr. Constantine is going to say that they are.

7 The question is do you believe one or the other,
8 and you'll necessarily have a problem with the jury.
9 That's the point that I was making.

10 There are other aspects of this, Judge, to
11 provide support for the Court to realize Mr. Kenner's
12 position is antagonistic.

13 There was the counterclaim that my client filed
14 in one of the lawsuits where he was detailing the fraud
15 that Mr. Kenner and others were involved in. That was an
16 exhibit to our original motion.

17 Then there was actually a recording that we
18 recently received. I apologize. We may not have recently
19 received it. I haven't had a chance to really listen to
20 it. I'm told it's a recording where Mr. Kenner accuses
21 Mr. Constantine in a curse word that he had in effect
22 taken the money from the global settlement.

23 So from the specific allegations that have been
24 made in prior proceedings, Judge, we know what the
25 parties' position are going to be.

1 And one of the things that I learned and, again,
2 I apologize. I tried finding this in the status reports
3 before the Court, but I understand Mr. Kenner's lawyer at
4 one time actually said he may be acting as a prosecutor in
5 his examination of the witnesses at the trial, which leads
6 credence to the fact that they see the positions of the
7 codefendants as being antagonistic and warrant
8 consideration.

9 THE COURT: I think that covers your motions,
10 right?

11 MR. LARUSSO: It does, your Honor.

12 THE COURT: I'll let the government respond to
13 that, Mr. Haley, before you go.

14 Go ahead, Mr. Miskiewicz.

15 MR. MISKIEWICZ: Thank you, your Honor.

16 With respect to the motion for dismissal, if the
17 Court has any questions, I'll be happy to answer them.
18 Otherwise, we rest on our submission.

19 THE COURT: Mr. LaRusso's argument is that the
20 indictment has essentially shifted; Mr. Gonchar is out,
21 and that there are aspects to certain allegations with
22 respect to the airplane that the government is now
23 disavowing. I do want you to respond to that.

24 MR. MISKIEWICZ: The government isn't disavowing
25 the overall fraud, and ultimately the nature of the Eufora

1 fraud is such that the defendants, both Kenner and
2 Constantine, but in this case we will focus on
3 Mr. Constantine, induced a number of individuals to invest
4 in a company based on certain representations about its
5 credit worthiness implicitly, and also its ability to make
6 money in the near term.

7 And specifically, for instance, as to
8 Mr. Privitello, on the nature of what he was getting for
9 the money he invested, that he would become an operating
10 member -- this was an LLC, not a corporation so that he
11 would get shares, but they got pro rata memberships in
12 this LLC.

13 And with respect to the wire transfers that we
14 have really deleted I guess is the right word in the
15 superseding indictment, is that that doesn't mean that we
16 disavowed the nature of the fraud.

17 We simply recognized that the strongest, if you
18 will, evidence is not this one tiny little piece of where
19 this money went.

20 It may very well have been an inadvertent
21 diversion at that stage, and ultimately temporarily went
22 back into Eufora for the sake of Eufora, but what the
23 overall evidence is going to show is that much of the
24 money was sent or used really for the defendant's own
25 personal benefit.

1 And with respect to Mr. Privitello, because that
2 was the wire transfer at issue, the evidence, the
3 documentary evidence, is going to show that
4 Mr. Constantine represented to Mr. Privitello that he
5 would obtain a 1.5 share of Eufora in exchange for his
6 investment, and other people would get other percentages.

7 And, yet, what he did and what he did even in
8 sworn affidavits in the Eastern District of New York in
9 civil litigation that preceded the indictment, he
10 disavowed ever making such an agreement and to this day
11 Mr. Privitello is out the money, he is out a percentage
12 interest in Eufora. He has basically had his pocket
13 picked by Mr. Constantine.

14 So that misdirection probably was not the best
15 evidence of Mr. Constantine's fraudulent intent; and so
16 consequently, to streamline the case, the government did
17 redact it or removed it from the superseding indictment,
18 but we do not disavow and we have not changed our theory.

19 He took people's money, he used it for his own
20 benefit, and then he denied people what he had promised
21 that they would get in exchange for their investments.

22 MR. LARUSSO: Your Honor, can I make one point?
23 I think it's partly in response, but I want to emphasize
24 this.

25 In the superseding indictment, the government

1 removed approximately eight victims. It went from 19
2 hockey players to 11, one of whom is Mr. Gonchar who I
3 mentioned in my argument I've spoken with him and flatly
4 refutes the government's allegations in this indictment.

5 But there are others, others who are not aligned
6 with the Government witnesses. There's evidence in the
7 grand jury that they were victims. I don't know what
8 evidence was presented by Mr. Galioto regarding those
9 hockey players, and why they were victims of this massive
10 fraud, but they now have been removed, as have many of the
11 general allegations.

12 And the motion we're making is that we didn't
13 get a fair presentation. There was not in any respect an
14 opportunity for the jurors to assess the relevant evidence
15 on now only 11 victims as opposed to 19.

16 Why they're no longer victims is a substantial
17 question, and why the specific allegations are removed is
18 also a substantial question in light of some of the issues
19 we raised with the Court.

20 I can't ask every single question regarding how
21 that money was spent and what the analysis showed. I hope
22 to be prepared to do that at trial.

23 I'm just raising the question that there is
24 something amiss here. There was certainly not just
25 mistakes, but deliberate efforts to ignore evidence and

1 now the government's own superseding indictment adds fuel
2 to the fire. They're conceding that these people weren't
3 the victims as they were allegedly portrayed in that grand
4 jury.

5 I appreciate the opportunity to make that
6 comment, your Honor.

7 MR. MISKIEWICZ: May I respond?

8 THE COURT: Yes.

9 MR. MISKIEWICZ: There will no doubt be
10 testimony from Mr. Gonchar and other victims at trial
11 where they will say to this day they don't have a clue
12 what Mr. Constantine and Mr. Kenner have done with their
13 money.

14 Moreover, they will say that they've heard for
15 years allegations about fraud by a great number of people,
16 John Kaiser and Mr. Jowdy being among them.

17 What each of those victims will say, and
18 Mr. Gonchar is one of them since I've spoken to him, and I
19 anticipate that all of them will say that all those
20 allegations about fraudulent conduct by others comes from
21 and ends with the two defendants in this case.

22 And the litigation that has preceded here
23 basically I think it's really irrelevant, but if one were
24 to pour over the litigation, one would see that numerous
25 victims who claimed fraud on the part of the defendants

1 here in the civil context, the defendants responded in
2 exactly the same way that Mr. LaRusso is responding here
3 now, which is it's not us, it's other people.

4 So it may very well be that some of the
5 witnesses -- and frankly we're being careful in our
6 preparation because some of those witnesses are going to
7 see on the stand for the first time how the money went
8 into the pockets of the defendants, Kenner and
9 Constantine, and the fact that they have said in previous
10 context I think these guys were great, which is
11 essentially what Mr. Gonchar has said, is really going to
12 be perhaps one of the things I'll even affirmatively try
13 to get out from them, and then show them where the money
14 went and then we will see if Mr. Gonchar and other victims
15 continue to maintain that position, or if suddenly the
16 jury sees the light bulb go off in their heads and
17 realizes that the people that they thought were so great
18 for all these years are actually people who have stolen
19 all their money.

20 That's really ultimately -- it's an unusual sort
21 of twist to a complex white collar fraud, but I'm certain
22 that that is going to be something that I think will be
23 revealed throughout the trial.

24 It does not, however, require either an
25 evidentiary hearing or dismissal on the grounds of

1 government misconduct. There has been no government
2 misconduct.

3 MR. LARUSSO: Your Honor, just one last point.

4 I think what Mr. Miskiewicz is failing to
5 realize, Mr. Gonchar was listed as a victim. He, himself,
6 doesn't believe he was, and there was no opportunity to
7 pursue that or present a fair documentation regarding
8 whether he was or wasn't right.

9 But be that as it may, the two points I wanted
10 to make is, and I don't know if Mr. Miskiewicz is aware of
11 this, but Mr. Jowdy has been sued for trying by a number
12 of hockey players.

13 There was \$25 million invested in the Mexican
14 development that have been lost. Nobody seems to be
15 focusing on that. But there is a suit pending to try and
16 get the records for Mr. Jowdy.

17 I only say this because I know it's going to
18 dovetail into Mr. Haley's argument.

19 Mr. Jowdy is an individual who the government
20 attempted to protect by keeping him out of the indictment
21 in light of withholding the records I mentioned to you
22 before.

23 And in order to get a fair presentation, that
24 should have been done and it was never done.

25 I would ask the Court to consider not just the

1 Privitello situation, but all of the documents that the
2 government withheld.

3 THE COURT: Do you want to address the
4 severance, Mr. Miskiewicz?

5 MR. MISKIEWICZ: Yes, briefly, your Honor.

6 I think your Honor already addressed the issue
7 of antagonistic defenses, as well as the government's
8 indication that we were not intending to use, nor will we
9 use, the Home Depot tape recording because of the
10 possibility of a Bruton issue arising.

11 And if I didn't say so in our submission, that
12 would go for any e-mail authored by one defendant blaming
13 the other, unless there would be some basis by which we
14 could argue that it really did constitute a coconspirator
15 statement.

16 At this stage I can't say that I found such an
17 e-mail, and otherwise we would have presented that to your
18 Honor pretrial and make a determination of that
19 admissibility under 801(d)(2)(E).

20 I would only say this generally about the
21 argument in favor of severance raised by Mr. LaRusso, and
22 it is this.

23 Virtually all of the argument is premised on
24 Mr. LaRusso and/or Mr. Haley's ability to elicit
25 inadmissible hearsay in defense of their clients.

1 And what I mean by that is I suspect there will
2 be many, many questions of witnesses in this trial,
3 government witnesses in this trial, in which they attempt
4 to introduce into the record prior affidavits, other sorts
5 of e-mails, self-exculpatory type of e-mails from one
6 defendant or another, all of which will constitute an
7 effort to shift blame to another person and self-exculpate
8 whatever defendant happens to be running the
9 cross-examination at that moment.

10 And I say that because I suspect it's going to
11 be a reoccurring issue and may result in a lot of sidebars
12 and I have been trying to think of a way to catalogue all
13 of the potential documents that I suspect counsel are
14 going to try and offer at trial. It's just so voluminous
15 at this stage, I'm not sure I can do that.

16 The fact that they will not be able to -- the
17 fact that they wish to introduce exculpating, blame
18 shifting hearsay is also not a reason for severance.

19 And I'm confident that the Court will, in due
20 course of time over the trial, make the evidentiary
21 rulings that need to be made at that moment as to whether
22 these documents are admissible or not.

23 So that doesn't answer the question about
24 whether or not the defendants take the stand and blame
25 each other; but, again, Mr. LaRusso's comment what if his

1 client takes the stand and the jury doesn't believe him,
2 his client doesn't have to take the stand, as he knows,
3 but if he does and the jury doesn't believe him, that's
4 not a basis for severance or any sort of violation. In
5 fact, that's exactly what this forum is for.

6 So, other than that, if you have any questions
7 about our position regarding severance, we otherwise rest
8 on our papers.

9 THE COURT: No, I don't have any other
10 questions.

11 I'm going to place the Court's ruling on the
12 record with respect to these. I may issue a written
13 decision as well, but given obviously how close the trial
14 date is, I want to place an oral ruling on the record so
15 the parties can properly prepare.

16 First, with respect to the motion for severance,
17 the motion is denied for the following reasons:

18 First, as I think everyone concedes at this
19 point, the Court is aware and defense counsel has not
20 pointed the Court to any Bruton issue.

21 The Home Depot tape, as it stands now, is not
22 coming into evidence. I'm not aware of any other evidence
23 that would create a Bruton problem, a confrontation clause
24 problem, such that severance would be warranted on that
25 basis.

1 The primary argument, the main argument, is
2 basically one of antagonistic defenses. The law on that
3 is clear in numerous cases, and I just going to cite two;
4 United States vs. Escobar, 462 Fed.Appx. 58, Second
5 Circuit 2012, where the Circuit denotes a summary order
6 outlining the law as relates to antagonistic defenses in a
7 detailed way.

8 And the bottom line, as I have discussed, is
9 that merely finger pointing is not sufficient for there to
10 be a severance.

11 The second case I'll cite is United States vs.
12 Corsey, 512 Fed.Appx. 6, Second Circuit 2013.

13 The Court in that case explained it this way;
14 differing levels of culpability and proof are inevitable
15 in any multi-defendant trial, and standing alone are
16 insufficient grounds for separate trials.

17 And it says: Our own review of the record
18 convinces us that this is not a case where the jury, in
19 order to believe one defendant's testimony, would have to
20 disbelieve the testimony of a codefendant. And they said
21 some antagonism does not require severance.

22 I conclude, based upon my understanding of this
23 case, that this is one of those situations where people
24 may attempt to shift blame or point fingers at each other.
25 The defendants, through their testimony or through their

1 lawyers, may seek to do that, but I heard no defense that
2 is going to be proffered by either Mr. Kenner or
3 Mr. Constantine that would be a situation where the jury,
4 in order to believe one defendant's testimony, would have
5 to disbelieve the testimony of the codefendant.

6 As I noted to Mr. LaRusso, the fact that they
7 may have given responsibility to each other for particular
8 aspects of money, or may have been under some
9 understanding how certain money should be used, does not
10 necessarily mean that the jury will have to disbelieve or
11 convict the codefendant.

12 The codefendant could have, through his own
13 testimony or through his lawyer's presentation of
14 evidence, perfectly good explanations for his position,
15 what he did with the money, what representations he made
16 to the victims that address any potential finger pointing
17 by the codefendant.

18 So I don't see this as one of those situations
19 where severance is required from an evidentiary basis or
20 from a basis of the defenses that I have heard from
21 Mr. LaRusso, so that motion is denied.

22 The motion to dismiss the indictment for grand
23 jury misconduct and I guess related misconduct as relates
24 to the deposition is denied.

25 I also don't believe there's a sufficient basis

1 for the Court to conduct an in camera inspection of the
2 grand jury minutes and the reasons for that is as follows:

3 The standard for dismissal of an indictment, as
4 both the Supreme Court and the Second Circuit has
5 emphasized in fact in a summary order in United States vs.
6 Howard, 216 F.3d 1074, Second Circuit 2000, Second Circuit
7 said:

8 Quote, the District Court cannot dismiss an
9 indictment because the prosecution presented unreliable,
10 misleading or incomplete evidence to the grand jury.

11 This is consistent with a Supreme Court case,
12 United States vs. Williams, 504 U.S. 36, 1992, where the
13 Supreme Court held if the indictment is otherwise valid,
14 the government's failure to disclose exculpatory evidence
15 to the grand jury is not a basis for dismissal of the
16 indictment.

17 There's another Supreme Court case, Costello vs.
18 United States, 350 U.S. 359, 1956, and finally, United
19 States vs. Jones, 164 F.3d 620, Second Circuit 1998, which
20 says:

21 Misleading testimony, including an inaccurate
22 summary of the evidence, absent other evidence for
23 prosecutorial misconduct alone, would not support
24 dismissal of the indictment.

25 I've just cited these cases as examples of how

1 high the standard is to dismiss an indictment based upon
2 an argument that the Government's presentation to the
3 grand jury was misleading or incomplete in some way
4 because of evidence that was left out.

5 Based upon the arguments that have been made by
6 defendant Constantine, I do not believe we're even in the
7 same realm, but anything that would question the validity
8 of the indictment and the grand jury's decision in this
9 case, the issues regarding the civil depositions are so
10 attenuated they certainly would not rise to any level
11 sufficient to question the grand jury's decision in the
12 case, or the agent's involvement in the presentation of
13 the grand jury; and, similarly, the government's decisions
14 with respect to not moving forward with respect to certain
15 victims or eliminating certain aspects of their case is
16 not a sufficient basis to dismiss an indictment.

17 And, in fact, as I noted, I carefully reviewed
18 Mr. Constantine's position with respect to some of these
19 issues; and although he has explanation that he seeks to
20 proffer for some aspects of the diverting of
21 Mr. Privitello's money, the government's failure to
22 present that version -- or I don't know what exactly they
23 should have done with respect to that -- or his claim is
24 what they should have done with respect to that, is not a
25 basis to dismiss the indictment.

1 And the bottom line is the government's core
2 fraud allegations with respect to the case, there's no
3 indication that there was any misconduct with respect to
4 those that would warrant dismissal of the indictment.

5 And I also conclude there's not a sufficient
6 basis for the Court to conduct an in camera review of the
7 transcript of the grand jury's proceeding for all the same
8 reasons. I believe there's been an insufficient showing
9 to warrant that in this case, and for those reasons the
10 motion is denied.

11 Mr. Haley, I'll give you a chance to highlight
12 anything you want to highlight.

13 MR. HALEY: Yes, sir. Thank you.

14 Your Honor, I imagine I should --

15 THE COURT: I'm sorry, one more thing.

16 To the extent Mr. LaRusso requested an
17 evidentiary hearing on that, for the same reasons I don't
18 believe an evidentiary hearing is appropriate because the
19 proffers as to what's being challenged would be
20 insufficient to meet the standard in any event in a
21 hearing.

22 For example, if there was a hearing where the
23 agent made some statement to a witness that could be
24 construed as not answering a question at a deposition,
25 even if that were established at a hearing in the

1 circumstances of this case, it would not warrant dismissal
2 of the indictment, or any relief with respect to the
3 indictment, so there's no purpose for an evidentiary
4 hearing on that or the other matters which are
5 insufficient to challenge the government's core allegation
6 as relates to this indictment. Otherwise, you will have a
7 mini trial, a trial before the trial about the indictment,
8 and the aspects of the indictment that the defendant is
9 challenging, and that's not how the system works.

10 Go ahead, Mr. Haley.

11 MR. HALEY: Thank you, Judge.

12 Your Honor, I guess I should begin with a little
13 bit of a confession.

14 In law school I did not do well in trusts and
15 estates. I did not really understand the rule against
16 perpetuities.

17 I did fairly well in the rules of evidence,
18 Judge, and I know what self-serving inadmissible hearsay
19 is as a concept.

20 So when Mr. Miskiewicz says to the Court that he
21 proffers that the defense of Mr. Kenner will be based upon
22 an effort on my part to elicit self-serving inadmissible
23 hearsay, that will not take place.

24 What will take place, Judge, is questioning of
25 witnesses who have testified under oath previously,

1 specifically the testimony of Mr. Peca, who testified
2 before the grand jury impaneled in the Southern District
3 of New York, whose testimony is contradictory to material
4 allegations even in this superseding indictment concerning
5 his knowledge of the use of his line of credit.

6 It will be based upon the testimony of Darryl
7 Sydor before the grand jury impaneled in the Southern
8 District of New York, where he similarly testified full
9 awareness of the use of his funds as deposited in his line
10 of credit.

11 It will be based upon the grand jury testimony
12 of Mr. Stevenson who testified before the grand jury
13 impaneled in the Southern District of New York, who
14 testified as well that he was fully aware of the use of
15 his line of credit, and authorized Mr. Kenner to access
16 his line of credit to make investments in the Hawaii land
17 development which the government characterizes as a
18 scheme.

19 It will be based upon the testimony of John
20 Kaiser who testified in what is known as the Nolan
21 arbitration.

22 It will be based upon the testimony of
23 Mr. Berard who similarly testified in the Nolan
24 arbitration.

25 It will be based upon the testimony of Ken Jowdy

1 who similarly testified in the Nolan arbitration and also
2 testified in other proceedings on other occasions.

3 I respectfully submit to the Court that the
4 testimony given before a grand jury and testimony given
5 before an arbitration is not hearsay, Judge, and --

6 THE COURT: I don't want to spend too much time
7 on what's hearsay and what's not hearsay. I have other
8 matters on today.

9 The two aspects of your motion are the
10 computer --

11 MR. HALEY: Yes, sir.

12 THE COURT: -- the computer and the subpoenas,
13 so let's stay focused on that.

14 MR. HALEY: Judge, as far as the Ganas decision
15 is concerned, I fully briefed the issue. There's an
16 affidavit submitted in support of our motion. I note the
17 government's response to that aspect of the motion is not
18 supported by affidavit.

19 So it appears, at least based on this record,
20 the government acknowledges that they're in possession of
21 personal information, significant amount of personal
22 information, contained on Mr. Kenner's MacBook computer.
23 It also appears, having been in possession of that
24 information for 16 months, it has not been purged.

25 And my argument as set forth in my brief before

1 the Court regarding Ganas, Ganas was focused on the need
2 to avoid what has been historically called the general
3 warrant, where the government will go in and simply seize
4 everything in sight and retain it for purposes of
5 conducting their investigation when aspects of what they
6 seized are clearly immaterial and irrelevant to the
7 prosecution. But I made that argument, Judge, in my
8 papers and I will not repeat it for purposes of the
9 record. I believe the issue is fully briefed.

10 Your Honor, I do appreciate the consideration
11 your Honor gave us today because it was my request that
12 the matter be put down for a hearing today. We have a
13 trial date and there is a request for the issuance of Rule
14 17 subpoenas that we maintain, Judge, are material and
15 necessary to the defense of the action.

16 I know your Honor has reviewed the relevant
17 portions of Mr. Kenner's affidavit in that respect. It
18 reads: Of course, in consultation with my attorney, I
19 compiled a list of documents to be produced pursuant to
20 the subpoena which are relevant and material to my
21 defense.

22 Each document, as requested in the subpoena,
23 concerns transactions between myself and respective John
24 Does and Jane Doe with respect to the various allegations
25 in the indictment.

1 If you look at what's set forth, Judge, on
2 Schedule A of each one of those requests, it specifically
3 refers to transactions that cover the four-corners of that
4 indictment. It specifically refers to John Does
5 identified in that indictment.

6 Judge, I'm not asking for a document from
7 Mr. Kaiser who, perhaps in application for a driver's
8 license, made a material misrepresentation such that that
9 would be used for impeachment purposes.

10 Those documents requested in the subpoenas are
11 tailored to the specific allegations in the complaint,
12 Judge.

13 THE COURT: Do you consider 13 years of bank
14 records to be tailored? 13 years of a person's bank
15 records, that's tailoring?

16 MR. HALEY: Your Honor, the answer is yes, if I
17 may respond.

18 The indictment covers a 13-year period. The
19 bank records that we're looking for, if you look at those
20 subpoena requests in particular, let's start with the
21 Charles Schwab accounts.

22 What transpired here, Judge, as reflected in the
23 discovery presented by the government to date, is various
24 clients that were in contact with my client had funds
25 deposited in Charles Schwab.

1 There was a proposal by which they would
2 transfer those funds from Charles Schwab to Northern
3 Trust, and those funds would then be placed and utilized
4 to establish a line of credit.

5 The documents we're requesting in the Charles
6 Schwab subpoena in particular is limited to those specific
7 John Does.

8 There are other John Does, Judge. We haven't
9 requested those documents because we acquired them already
10 in Rule 16 discovery.

11 Each one of these John Does with reference to
12 the transaction in Charles Schwab, as well as the request
13 by way of Northern Trust, signed documents on multiple
14 occasions authorizing these funds to go from Charles
15 Schwab and then into the Northern Trust line of credit.

16 And each one of those documents, Judge, the
17 transaction reports going down through to line 23, will
18 bear the signature of that John Doe and that will
19 demonstrate to the jury that each one of these John Does,
20 on multiple occasions, had to authorize the transfer and
21 use of their funds by Phil Kenner, and that stands in
22 direct contradiction to material aspects of this
23 indictment.

24 Judge, I might add, to give your Honor some
25 flavor, the arbitration I referred to a moment ago with

1 reference to the Nolan arbitration, in that arbitration,
2 Mr. Nolan, who will be called as a witness, signed a one
3 page document which reads as follows:

4 To Northern Trust: Please allow Phillip A.
5 Kenner to access this outstanding LLC for direct deposit
6 into the Little Isle account at Northern Trust Bank. He's
7 authorized to sign for the release of funds related to my
8 line of credit.

9 Thank you for your assistance in this matter,
10 signed Owen Nolan.

11 If those subpoenas are issued, Judge, for each
12 one of the John Does, we expect that you are going to see,
13 and what will be revealed in that subpoena, in those
14 subpoenaed records, is the same letter, either identical
15 or similar, from each one of those John Does.

16 And that goes to a direct allegation as set
17 forth in the indictment which claims that the investor
18 clients were unaware that Mr. Kenner was going to access
19 their line of credits and had no authority to do so.

20 THE COURT: On the Northern Trust bank record
21 your client admits, in his affidavit, that he hasn't had a
22 chance to fully look at the Northern Trust records that
23 are in the discovery. You apparently have some of them.
24 You may have the rest of them as well.

25 MR. HALEY: Your Honor, I covered that this

1 morning with my client.

2 We haven't been able to access records as set
3 forth in that affidavit. We indicated in the affidavit
4 that we would be looking at the records we have. The
5 records we have are incomplete.

6 Judge, might I say this.

7 THE COURT: Have you looked at every single
8 Nolan Trust bank record yet?

9 MR. HALEY: The answer to that is yes, Judge.

10 Judge, if I may, what we're talking about here
11 is a subpoena to a third-party institution, a banking
12 institution.

13 And in order for me to be able to argue in front
14 of the jury that there was full knowledge and disclosure
15 as relates to these line of credits, I want the
16 opportunity to stand up in front of that jury and say a
17 subpoenaed was issued by the Court and pursuant to that
18 subpoena these records are delivered.

19 I don't want the jury to, or the government for
20 that matter, to make an argument that somehow that
21 subpoena did not cover the time period in question,
22 somehow those records did not cover the time period in
23 question.

24 I want to be able to say to the jury, this is a
25 full and complete representation of the records maintained

1 by that banking institution, and nowhere in those records
2 will you find a letter from Phil Kenner saying; Dear Sir:
3 Please direct that all future communications regarding
4 this individual's line of credit not be sent to his home
5 address; but, instead, be sent to me at my address in
6 Arizona.

7 Judge, we take a risk, because if those records
8 come in and there's such a document, which we maintain
9 does not exist, it will be utilized by the government.

10 Judge, one final comment. We have -- if this
11 were a civil case -- Rule 45, I would respectfully submit
12 without question, would allow those subpoenas to issue.

13 If this were a civil case, and your Honor had a
14 document of this nature signed by Owen Nolan where he
15 acknowledges receipt of -- acknowledges authorization for
16 my client to utilize those funds for those purposes, and
17 there was a motion for summary judgment, your Honor would
18 grant the motion and Mr. Nolan's statement as he related
19 in the arbitration proceeding; well, there's a lot of
20 documents I signed that I don't read, would not, with all
21 due respect, be accepted by this Court to defeat that
22 motion for summary judgment.

23 THE COURT: Okay.

24 Mr. Miskiewicz, your response.

25 MR. MISKIEWICZ: Your Honor, I think a motion

1 for subpoenas, first of all, concedes that Mr. Haley
2 cannot make any of the elements under the Nixon standards.

3 And, alternatively, he is seeking to apply
4 what's been referred to by other courts as a more liberal
5 or permissive standard articulated by Judge Scheindlin in
6 the Southern District in a couple of cases there,
7 specifically Tucker and Nachamie.

8 The government's position is that he doesn't
9 even meet those standards, those more permissive
10 standards, because Judge Scheindlin, even if the Court
11 were inclined to adopt that as the basis for issuing Rule
12 17(c) subpoenas in a criminal case says, among other
13 things, that the defendant has to show that there is an
14 articulable suspicion that the documents may be material
15 to the defense, and that the subpoenas are reasonably
16 construed as material to the defense, and not unduly
17 oppressive for the purpose -- and not unduly oppressive
18 for the producing party to respond to.

19 There is nothing here but broad categories of
20 documents that are demanded by individuals and/or
21 companies, almost all of which have been assuredly gotten
22 by the defendant Mr. Kenner over the last eight, nine, ten
23 years of the operation of the fraud and various civil
24 litigation that has occurred.

25 There is absolutely nothing that he articulates

1 in his motion that suggests that this is anything but to
2 oppress parties and harass them.

3 Charles Schwab, it's important for the Court to
4 know that in most instances the victims here had accounts
5 at Charles Schwab predating the commencement of the Hawaii
6 property fraud aspect charged in count 1.

7 The evidence will be that the defendant
8 convinced them to move all of their securities, positions,
9 bonds, cash to a different bank, Northern Trust.

10 Accordingly, what possible relevance would
11 Charles Schwab have to any of the counts of the indictment
12 is something that he simply does not explain.

13 THE COURT: Let me ask you to address
14 Mr. Haley's focus, for example, which is any
15 authorizations for the use of funds, to the extent they
16 have not been produced in discovery, why wouldn't it be an
17 important aspect of the case for Mr. Kenner to get
18 whatever authorizations exist in the Northern Trust bank
19 for the use of funds?

20 It seems to me that would be an important aspect
21 of the case, if it's not part of what's been produced
22 already.

23 MR. MISKIEWICZ: First of all, your Honor, I'm
24 not sure I have heard from Mr. Haley that it hasn't been
25 produced.

1 And, frankly, my review of our Rule 16
2 production is any authorization by the victims, and there
3 are many letters like this giving power of attorney to the
4 defendant, to the extent the victims signed those, that's
5 been produced.

6 There are some of those in which victims have
7 looked at both in trial prep here and in civil litigation
8 previously where they have been able to say; that doesn't
9 really look like my signature, and that may be an issue at
10 trial as to whether or not they really signed documents
11 that are proffered, but I'm unaware of any authorization
12 documents that have not been produced in Rule 17 and, as I
13 say, there are quite a few.

14 With respect to its relevance to any of the
15 counts, there is no question that the defendants obtained
16 letters of credit with the knowledge of the victims for
17 specific purposes regarding development of the Hawaii
18 properties.

19 And some of them will even say they understood
20 that some of their money would go to a real estate
21 development in Northern California run originally by Mr.
22 Jowdy. That's immaterial.

23 What none of the victims will say is I
24 authorized Mr. Kenner or Mr. Constantine to take money out
25 of my letter of credit and pay bills, personal bills, or

1 buy property that they, as their clients, had no interest
2 in.

3 One of the John Does, Bryan Berard -- I'm sorry,
4 Michael Peca, will testify that he had no idea that his
5 letter of credit money for the Hawaii properties was then
6 sucked out and used to buy property in Sag Harbor, which
7 is the Led Better property fraud alleged in the
8 indictment.

9 So Mr. Haley and the defendant's argument well,
10 we need these authorization letters, again, I think they
11 have them.

12 Secondly, they had them for a long time.

13 Thirdly, the nature of the fraud as it's going
14 to be established at trial, for instance, in Northern
15 Trust bank records, account records, those 13 years of
16 bank account records, they were sent to the defendant
17 Kenner specifically to conceal what was going on with
18 those letters of credit so that the victims could be
19 assured orally and falsely that their money was safe.

20 So I understand the manufactured exculpatory or
21 favorable evidence that Mr. Haley is intending to offer.
22 If we had it, we would give it to them. He's
23 manufacturing a theory that really isn't favorable or
24 doesn't exculpate any of the basis of the charges here.

25 THE COURT: What about -- is Mr. Berard a victim

1 in the case?

2 MR. MISKIEWICZ: Yes.

3 THE COURT: And so one of the things they're
4 requesting is all e-mail, text and supporting
5 documentation between Berard, Kenner and/or John Kaiser
6 relating to meetings and other things related to the
7 Hawaii joint venture with Adam Worth, along with Lehman
8 Brothers and Trimont Real Estate Advisors, Inc.

9 So, again, why wouldn't that -- obviously I have
10 concern with how broad they are, but that doesn't strike
11 me as particularly broad.

12 If he's going to be testifying regarding the
13 Hawaii joint venture, why shouldn't he provide e-mails
14 that relate to that?

15 MR. MISKIEWICZ: Again, because I don't know
16 what the Lehman Brothers loan has anything to do with any
17 of the counts in this indictment.

18 THE COURT: What about the Hawaii joint venture
19 though?

20 MR. MISKIEWICZ: I'm not sure I understand. You
21 mean all of the joint venture agreements?

22 THE COURT: No, e-mails regarding the Hawaii
23 joint venture, e-mails regarding meetings, decisions,
24 potential legal actions regarding the Hawaii joint
25 ventures, is that part of this case?

1 MR. MISKIEWICZ: Part of it, yes.

2 THE COURT: If Mr. Berard is going to be
3 testifying about that joint venture, why shouldn't he have
4 to produce e-mails between him and Mr. Kenner and
5 Mr. Kaiser regarding that? That doesn't seem to be
6 particularly onerous or broad.

7 MR. MISKIEWICZ: I really don't have a strong
8 opposition to the production of the e-mails regarding
9 anything that he has to testify about.

10 Frankly, in preparation for trial, we have been
11 trying to see, and we have been periodically supplementing
12 Rule 16 discovery or early 3500 discovery with additional
13 e-mails and such that we have obtained from the various
14 victims.

15 So I guess on that issue, Mr. Berard's e-mail,
16 if they related specifically to the Hawaii venture, I
17 can't say that we have a strong opposition other than I
18 think it's our obligation to turn over affirmatively
19 anything that's favorable, and we take that seriously.

20 THE COURT: You may not have it, right?

21 MR. MISKIEWICZ: Well, we have though, and I
22 take it upon myself as part of my responsibility in
23 preparing witnesses to determine if they have
24 documentation that would constitute 3500 material, and
25 then within that if there's anything that would be

1 favorable, and that's what we have been doing, and we have
2 been doing that for a number of months.

3 If the Court wanted -- if the Court felt that
4 that was sufficiently focused enough, I see the Court's
5 point. I'm not going to really argue about that.

6 My major concern here was the much broader
7 subpoena for demands both to the banks, again for the
8 reasons I have raised, and also with respect to some of
9 the other material here, it doesn't articulate anything
10 that they could say they have a reasonable grounds to say
11 is favorable to the defense or material to the defense, if
12 that were the standard, and I'm not sure that's the Nixon
13 standard which, again, we still contend is the standard.

14 THE COURT: What about Mr. Kaiser? There's four
15 pages of things with respect to Mr. Kaiser. What's your
16 response?

17 MR. MISKIEWICZ: That much of this material has
18 already been turned over in Rule 16 and/or it begins with
19 documents related to the distribution of funds from the
20 sale of the Sag Harbor property.

21 Again, that material has been disclosed to the
22 defense, to both defendants.

23 Moreover, the nature of the fraud is the fact
24 that he stole money from other people like Mr. Peca and
25 then stole -- and other victims to buy property and

1 asserted himself as the owner of the property.

2 So the disposition of funds from the seller of
3 that property, Mr. Kaiser and a number of other partners
4 own this property in Sag Harbor. One of the partners
5 wanted to get out of that deal. Mr. Kenner offered to buy
6 the property from Kaiser and his partners.

7 The nature of the fraud is how did he come up
8 with the money to buy Kaiser out? And what he does was
9 stole the money from other people.

10 So what Mr. Kaiser then did with the money that
11 he didn't know was stolen by Kenner is, again, I think is
12 just engineered to harass Mr. Kaiser.

13 THE COURT: Okay. Let me address the computer
14 issue. What's your response on the computer issue?

15 MR. MISKIEWICZ: With respect to the computer
16 issue, Judge, we cited a number of cases as well as the
17 commentary to the rule governing the downloading and
18 sifting of very voluminous records from computers.

19 THE COURT: Let me ask you this question. This
20 is the bottom line question at this juncture and we had
21 some discussion on this months ago, but the privilege
22 review is complete, correct?

23 MR. MISKIEWICZ: Yes.

24 THE COURT: I understand the Ganas decision
25 would be assuming that there was no dispute regarding the

1 authenticity of the relevant documents that you now pulled
2 from the computer, a mirror image, right? Are they a
3 mirror image?

4 MR. MISKIEWICZ: That's what we're working with.
5 No. We took the actual computer. We have been working
6 with mirror images ever since.

7 THE COURT: Right.

8 Let's assume Mr. Haley and Mr. LaRusso
9 stipulated to the authenticity of the relevant documents
10 that are now classified as the relevant documents at this
11 point in the litigation, why wouldn't the non-pertinent
12 documents, why couldn't the original computer then be
13 returned and the non-pertinent documents eliminated in
14 some way, because there's no reason for the government to
15 hold onto them at this point.

16 I understand if there's no agreement to
17 authenticity you have to hold the computer, pertinent or
18 not pertinent, because there could be an authenticity
19 problem.

20 But assuming that there's not, what would be the
21 reason for retaining the original computer with the
22 non-pertinent documents?

23 This is an independent issue of suppression, but
24 it's an issue of why the government is holding the
25 original computer at that point?

1 MR. MISKIEWICZ: The short answer is nothing.

2 However, we've only recently gotten access to
3 the non-privileged documents and for that matter the
4 non-privileged sections of the hard drive in the original
5 computer.

6 So we're going full blast at this stage
7 commencing really the search of a piece of equipment that
8 was seized 15 months ago or so, and we're not in a
9 position to say what within that we're going to offer and,
10 therefore, we're not even in a position to solicit
11 stipulations from both counsel. If they did it, I would
12 be happy to provide it.

13 THE COURT: When you say we're searching, I
14 thought the search was done and the documents were
15 reviewed for privilege. I'm confused. I thought the
16 search already happened and that the privilege was
17 reviewing what had been culled from the search. Isn't
18 that what happened?

19 MR. MISKIEWICZ: My understanding is what
20 happened and, again, because I'm on the opposite side of
21 that wall, I haven't seen what's been produced to
22 Mr. Haley, but my understanding is he's been provided with
23 a list of documents that the taint review team determined
24 then contained attorney/client privileged material and
25 therefore is not going to be provided to us.

1 Could it be that there are photographs and stuff
2 that's immaterial within a terabyte full of data, we're
3 just not, as I say, we're just beginning that process now.

4 If there are -- if there is such material, we
5 would be happy to either destroy it, as they did in the
6 Ganias case, or suggested that that would be a way to do
7 it, or simply focus on those things that we think we are
8 going to use in the trial and that were within the search
9 warrant affidavit.

10 But because of the volume, we were just
11 beginning -- I don't want to say just beginning -- we are
12 at a stage where we're getting a handle on what's there.

13 There is one other issue with regard to just the
14 return of the machine if you will, and that is the imaged
15 copies are the imaged copies and they can tell us both
16 physically what you see and the metadata behind the
17 documents that survive. There may also be deleted
18 material in that hard drive. Again which, once it's
19 turned back over to the defense, we've lost complete
20 ability to harvest if you will.

21 THE COURT: I know, but the theory of Ganias is
22 that the government shouldn't be able to -- once they do
23 their thorough search of the computer consistent with the
24 warrant, they shouldn't be able to hold the computer
25 indefinitely and continue to keep going back and

1 conducting subsequent searches. That's the theory of
2 Ganas. Is that the government -- otherwise, it's becomes
3 a general warrant at that point. I understand the
4 voluminous nature of the materials.

5 To the extent the government thinks that you can
6 hold the computer indefinitely and keep going back into it
7 to find whether something has been deleted or not deleted,
8 I don't think Ganas would permit the government to do
9 that for a prolong period of time.

10 MR. MISKIEWICZ: And I'm in total agreement with
11 that and I'm not suggesting that we have the right to do
12 that and we would be conducting, as we do in every case,
13 searches based on key words and ranges of documents or
14 date ranges that would hope to find those relevant
15 documents that are covered by the attachments to the
16 search warrant and nothing beyond that.

17 We're not -- in other words, what we are
18 specifically not doing is trolling through the hard drive
19 looking for material and seeing what's there.

20 We are methodically searching what's in the hard
21 drive but because of the volume and the number of
22 individuals, the number of transactions and the date
23 ranges, the search right now continues to go on.

24 THE COURT: Okay.

25 Mr. Haley, briefly, please.

1 MR. HALEY: Thank you, Judge. I will endeavor
2 to be brief. I appreciate your Honor's sentiment.

3 Your Honor, as far as Ganas is concerned, I
4 don't mean to be cute. My argument is that the government
5 can walk and chew gum at the same time.

6 What do I mean by that, Judge.

7 To say that the privilege review team has the
8 computer and, accordingly, the prosecution team has to
9 wait until the privilege review team looks at the computer
10 before they can take any action, is drawing a distinction,
11 your Honor, that I think is not in accord with Ganas and
12 what do I mean by that?

13 When the privilege review team had the computer
14 in its possession, and they turned it on for the first
15 time, they certainly could, in a relatively short period
16 of time, see that there were files on that computer that
17 were personal files, no relevant materiality whatsoever to
18 the investigation, like kids pictures.

19 Now, I would concede that the government then
20 would have the right to open up that file to see if
21 they're looking at a bunch of children's pictures or
22 family pictures. But once they have done that, they have
23 an obligation under Ganas to purging that information.

24 To say that the privilege review team somehow
25 gets isolated from the restrictions or the obligations

1 imposed by Ganas, I believe is a suggestion that somehow
2 the privilege review team is not part of the United States
3 team, and it is, and really that's my argument, Judge,
4 that there's some law review commentary that is cited in
5 my brief that suggested that Ganas has created a
6 defendant's right to have computer files purged and when
7 the government elects to not purge that information for an
8 extended period of time, and retains that information
9 whether they're looking at it or not, they're not entitled
10 to retain that information.

11 Ganas suggests that the remedy for that is
12 suppression of the documents that are otherwise arguably
13 relevant to the prosecution.

14 Judge, that's my argument.

15 Your Honor, if I may, with reference to the
16 subpoenas, in the superseding indictment the following
17 representation appears.

18 Kenner made a variety of misrepresentations to
19 the investors regarding lines of credit and their use.

20 Our position is he did not make
21 misrepresentations to the investors regarding the line of
22 credit and their use.

23 Our position is the documentary evidence which
24 will consist of documents signed by the Jane Doe or by the
25 John Does on multiple occasions over an extended period of

1 time, will reveal that they had full knowledge and
2 understanding of the use of the lines of credit.

3 THE COURT: I know. If you had done a subpoena
4 that said we want any and all communications relating to
5 the lines of credit and their use, that would be one
6 thing.

7 What you've given the Court is four pages of a
8 rider to John Kaiser with no explanation why each and
9 every one of these is relevant to the defense.

10 You asked for 12, 13 years of bank records for
11 Charles Schwab accounts of seven individuals.

12 And you can't give a subpoena that you want the
13 Court to approve for documents in advance of trial that to
14 me is a clearly overbroad fishing expedition, or cite to
15 me one example of something that may be in there that
16 might be relevant to the case.

17 If you want to put in a narrower request for
18 certain things, that's one thing. To think that I'm going
19 to sign a subpoena that requests 12 years of bank records
20 for these individuals is not going to happen.

21 It doesn't meet the standard as the government
22 points to of Nixon. It doesn't even meet the lower
23 standard of Judge Scheindlin. It meets no standard.

24 If you want documents in advance of trial, they
25 have to be requests that are specifically targeted for

1 relevant evidence in the case and you have to make that
2 showing and the showing that you need it in advance of
3 trial.

4 I'm prepared, because I don't want the trial to
5 be delayed, to give you categories of documents of some of
6 the ones that you indicated today for the reasons I said
7 to the government; yes, even though they're endeavoring to
8 do it, I have no problem so that you and your client can
9 be comfortable that you're getting everything that's out
10 there, issuing a subpoena to a victim that they provide
11 all communications related to a particular transaction or
12 line of credit, but these are not narrow requests and
13 that's the problem.

14 If you don't make narrow requests, I'm going to
15 deny your application and we will wait until they have
16 testified. You can ask, did you produce all documents you
17 had for a line of credit and they'll answer under oath
18 whatever they produced or not, and that's the way we will
19 deal with it.

20 This only deals with whether he gets them in
21 advance of trial, and this is not a sufficient showing for
22 him to get these broad categories of documents for
23 individuals in advance of trial. That's the issue.

24 MR. HALEY: May I respond?

25 THE COURT: Yes.

1 MR. HALEY: Your Honor, we went to great pains
2 to actually isolate specific documents so we're not going
3 through an alleged fishing expedition. These 23 documents
4 that are listed are designed to make sure that the request
5 stays focused in terms of documents that were signed with
6 respect to the lines of credit. That's why we did it.

7 If I asked for a subpoena that said give us any
8 and all banking records regarding lines of credit
9 maintained by the respective John Does during this period
10 of time, I suspect that would be overbroad and I
11 respectfully understand your Honor's hesitancy to issue
12 such a subpoena. That would be broadly-based.

13 The time period we're asking for, it may be when
14 that subpoena comes in, it may be, depending upon the
15 particular investor, the particular John Doe, that we may
16 only get let's say one year that contains all those 23
17 documents.

18 THE COURT: Why should you get the Charles
19 Schwab account of these -- the entire Charles Schwab
20 account of these individuals for 13 years, for 13 years,
21 because based on what Mr. Miskiewicz told me, in response
22 to communications with your client, they transferred money
23 from Charles Schwab to Northern Trust, and that's not even
24 a dispute in this case. Nobody is disputing that they
25 transferred the money. Why should you get 12 years of

1 their bank records?

2 MR. HALEY: If I may, Judge, my theory is this,
3 that the transfers from the Charles Schwab account to the
4 line of credit indicate early on that there were
5 discussions between my client and respective investors as
6 relates to taking funds out of the Charles Schwab account
7 and going into the Northern Trust account.

8 When their signatures appears on those
9 documents, they could be requested to describe the
10 circumstances under which you came to transfer your
11 Charles Schwab funds to the line of credit, is that your
12 signature? Yes. And what, if any, discussions did you
13 have with Phil Kenner regarding that? We're talking about
14 how these monies would be transferred from Charles Schwab.

15 THE COURT: Does your Charles Schwab subpoena
16 limit it to transfers? Does it limit it in any way to
17 transfers to the Northern Trust bank? Does it?

18 MR. HALEY: Your Honor, if I may, to answer your
19 question, the answer is no. The answer is I will concede
20 that we do not need the Charles Schwab records, because I
21 will concede that the more critical point as relates to
22 the allegations as set forth in the indictment are the
23 records that come out of Northern Trust.

24 I will, for purposes of answering your Honor's
25 question, concede that issue, Judge. We were looking to

1 obtain records that we believe are relevant and material
2 to the defense. Your Honor takes a different view of the
3 Charles Schwab. I'm not going to press the issue. I will
4 concede that.

5 Your Honor, if I may, when Mr. Miskiewicz argues
6 to the Court that we haven't met the Nixon standard, I
7 believe we have.

8 Our position is, Judge, I need not set the bar
9 higher than it need be for purposes of my understanding of
10 the law.

11 My understanding of the law is that United
12 States v. Nixon does not apply. I argued that in my
13 brief.

14 I believe, if your Honor finds Nixon does apply,
15 we met that standard. I do endeavor to be brief.

16 I spent a great deal of time in this case
17 getting an understanding, at least from my perspective, of
18 the myriad financial transactions that went on.

19 When you speak in terms of the Kaiser
20 indictment, because I know your Honor mentioned that and
21 it's four pages, but what your Honor must understand is
22 this.

23 The Northport property was owned by John Kaiser
24 and three other individuals. One of them was a Chris
25 Manfredi. Mr. Kaiser wanted Manfredi out of the LLC. So

1 Mr. Kaiser approached Phil Kenner --

2 THE COURT: Mr. Haley, I don't mean to interrupt
3 you. We're not going to go into the whole history with
4 the relationship with Mr. Kaiser. It's 4:00. It's not
5 going to cure, in my view, what is clearly an overbroad
6 request for a subpoena.

7 I'm going to place my ruling on the record with
8 respect to that without prejudice to you submitting
9 additional information to the Court. We're not going to
10 do that orally here. I'm not going to sit here and have
11 you go through and explain why four pages of requests to
12 John Kaiser are relevant to your case. You can do that in
13 writing. We're not going to sit here as you do that.

14 The Court's ruling is as under the Nixon
15 standard, United States vs. Nixon, which, in my view, is
16 what applies here, 18 U.S. 683, the standard for Rule 17
17 subpoena in advance of trial has not been met.

18 I have a broad category of requests from
19 individuals and from banks and Mr. Kenner has one or two
20 paragraphs in his affidavit, Mr. Haley mirrors those words
21 in his memorandum of law, and it is woefully insufficient
22 to support the Court, under the Nixon standard, requiring
23 all these categories of documents which in terms of how
24 broad they are with respect to the bank records to be
25 produced in advance of trial.

1 There is an insufficient showing that all these
2 categories of documents are evidentiary and relevant.

3 There's been no showing that they are not
4 otherwise procurable reasonably in advance of trial by the
5 exercise of due diligence.

6 There's no showing that they can't properly
7 prepare for trial without the production and inspection in
8 advance of trial, and that the failure to obtain such
9 inspection may tend to unreasonably delay the trial.

10 And I certainly conclude that the way they are
11 now, it is a fishing expedition even under Judge
12 Sheindlin's standard in the Tucker case. And, as I said
13 before, it doesn't meet even that standard. The Tucker
14 case was 2008 Westlaw 361127, Southern District of New
15 York, 2008.

16 Under her standard there has to be a showing
17 that the defendant has articulable suspicion the documents
18 may be material to his defense, and that it's not unduly
19 oppressive for the producing party to respond.

20 And, again, the categories of documents are way
21 too broad and no explanation has been provided as to why
22 they may be material to the defense, and I'm not going to
23 require them to be produced in advance of trial given the
24 way they have been presented to this Court.

25 I'm sensitive to the fact that Mr. Kenner wants

1 all of the documents that he needs to question the various
2 witnesses, and it's possible that some of these categories
3 of documents, that in order to not delay the trial, would
4 be helpful for him to have in advance of the trial to the
5 extent that they haven't already been produced and to the
6 extent that the government is not also seeking them from
7 the same individuals in the context of presenting the
8 evidence.

9 However, if, in fact, it's going to be done
10 under this rule, there would have to be a more narrow
11 request with an explanation for why those particular
12 documents are relevant to the defense and why they need to
13 be produced in advance of trial.

14 I'm willing to look at it again, but I'm not
15 going to blindly sign subpoenas for 12 years of bank
16 records for nine individuals who I have no information why
17 12 years of 13 years of bank records would be necessary.
18 I'm using that as an example. John Kaiser is four pages
19 of requests. I have no idea what each and every one of
20 those requests would relate to.

21 I understand the properties based on Mr. Haley's
22 explanation, I understand that, but that has to be
23 explained in more detail for me to sign off on those
24 subpoenas. That's my ruling with regard to that.

25 On the computer issue I agree with the

1 government. I'm denying the motion to suppress. I agree
2 with the government's interpretation of Ganas in terms of
3 a suppression issue, whether the Court should suppress the
4 evidence from the laptop and the iPhone because the
5 Government has not neither purged nor returned not
6 pertinent e-mails.

7 The Ganas situation is entirely different.
8 It's where they held it for 13 months and then went to get
9 a second warrant, and at that stage the Court suppressed
10 and said it's been converted to a general warrant.

11 Here, I think it's obvious from the record and
12 numerous conferences we had regarding this that there's a
13 voluminous amount of records that exist with respect to
14 that computer. It's further complicated by the privilege
15 review that has to be done. There are over 300,000 pages
16 of documents that are in issue here.

17 So my conclusion is that there's been no
18 demonstration that the Government's efforts to review the
19 materials, pertinent and not pertinent, privilege and not
20 privilege, has been a bad faith effort by them to retain
21 Mr. Kenner's not pertinent e-mails for future use to try
22 to go back in and use them at some later time, or for any
23 bad faith purpose other than the fact that these records
24 are voluminous and there's got to be interaction between
25 the taint review team and Mr. Haley regarding the

1 privilege documents that's preventing the trial team from
2 getting access to the computer.

3 As I said before, I'm willing to fully ensure
4 that once if there's any authenticity issues that are --
5 if all authenticity issues are resolved, that the original
6 computer be returned or that once all these issues have
7 been resolved that it be purged, the non-pertinent
8 portions be purged, if there's not a stipulation regarding
9 authenticity of the relevant documents.

10 But we're not at that stage yet and the trial is
11 two months away. This is one of these cases where the
12 review is continuing right up to the trial date. I'm not
13 sure exactly how this Ganas issue would be playing out in
14 this case. We're so close to the trial.

15 But there certainly is no basis to suppress the
16 evidence because the government to this point has not
17 purged not pertinent e-mail or returned the computer in
18 light of the clearly ongoing review of both the pertinent
19 materials and the privileged materials as relates to the
20 computer, so the motion is denied.

21 Mr. Haley, on the subpoenas, I'm here every day.
22 If you and your client want to revise them, narrow them
23 and provide a short explanation for why each is relevant
24 to the case and do it ex parte, the government doesn't
25 have to see that, I'm here to look at it. They have to be

1 narrowed.

2 Is there anything else?

3 MR. MISKIEWICZ: Nothing from the government.

4 THE COURT: Anything else, Mr. LaRusso?

5 MR. LARUSSO: No. Thank you, your Honor.

6 THE COURT: Anything else, Mr. Haley?

7 MR. HALEY: No, sir.

8 THE COURT: Thank you.

9 MR. MISKIEWICZ: Thank you, your Honor.

10 (Proceedings in this matter are concluded.)

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